

STATE OF NEW YORK  
DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>J.L.E. LANDSCAPING, INC.</b>	:	<b>ORDER</b>
for Revision of a Determination or for Refund of Sales	:	DTA NO. 830623
and Use Taxes under Articles 28 and 29 of the Tax	:	
Law for the Period September 1, 2016 through May 31,	:	
2019.	:	

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Petitioner, J.L.E. Landscaping, Inc., filed a petition for revision of a determination or for refund of sales and use taxes under articles 28 and 29 of the Tax Law for the period September 1, 2016 through May 31, 2019.

On December 2, 2022, the Division of Taxation, by its representative, Amanda Hiller, Esq. (Adam Roberts, Esq., of counsel), brought a motion seeking summary determination in the above-referenced matter pursuant to sections 3000.5 and 3000.9 of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, appearing by its president, Joseph L. Emmi, did not respond to the motion. The 90-day period for issuance of this order commenced on January 3, 2023.<sup>1</sup> Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Winifred M. Maloney, Administrative Law Judge, renders the following order.

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<sup>1</sup> January 1, 2023 is the 30th day from December 2, 2022. However, because January 1, 2023 fell on a Sunday, the public holiday, New Year's Day, was observed on Monday, January 2, 2023. Therefore, petitioner's response to the Division of Taxation's motion was required to be filed by Tuesday, January 3, 2023 (*see* General Construction Law § § 20, 24, 25-a).

***ISSUE***

Whether petitioner filed a timely request for conciliation conference with the Bureau of Conciliation and Mediation Services following issuance of a notice of determination.

***FINDINGS OF FACT***

1. The subject of the motion of the Division of Taxation (Division) is the timeliness of a request for conciliation conference (request) filed with the Division's Bureau of Conciliation and Mediation Services (BCMS) by petitioner, J.L.E. Landscaping, Inc., in protest of a notice of determination, dated March 13, 2020, and bearing assessment ID number L-051324966 (notice). The notice is addressed to "J.L.E. LANDSCAPING, INC." at a Clay, New York, address. The mailing cover sheet of this notice contains certified control number 7104 1002 9730 0119 6173.

2. A copy of the notice was also sent to petitioner's then-representative, Richard A. Pacific, under a mailing cover sheet that bore certified control number 7104 1002 9730 0119 6180 and the following address:

"RICHARD A. PACIFIC  
DATA CONCEPTS, INC.  
309 S. FRANKLIN STREET  
SYRACUSE, NY 13202."

3. Petitioner filed a request with BCMS in protest of the notice. The request was signed by petitioner's then-representative, Mr. Pacific, and was dated November 11, 2020. The request was faxed to and received by BCMS on November 11, 2020. The request lists petitioner's address as a Clay, New York, address, and its then-representative's address as Richard A. Pacific, 309 South Franklin Street, Syracuse, NY 13202. Accompanying the request was a Data Concepts, Inc. facsimile cover sheet (fax cover sheet), dated "11/11/2020," from Mr. Pacific to BCMS regarding J.L.E. Landscaping, Inc.'s "SALES TAX AUDIT 9/1/2016 – 5/31/2019." The "Comments" section of this fax cover sheet contained the following:

“THIS IS THE THIRD TIME WE HAVE FAXED THIS INFORMATION AND HAVE NOT HEARD FROM ANYONE. I KNOW WITH THE COVID-19 PANDEMIC EVERYTHING HAS CHANGED A LOT BUT WE WOULD LIKE TO GET THIS CLEARED UP. IF WE COULD HEAR FROM SOMEONE THAT WOULD BE GREAT. WE DO NOT AGREE WITH THE AUDIT CHANGES AS IT WAS CUT SHORT DUE TO THE COVID-19 PANDEMIC. THANK YOU FOR YOUR TIME AND STAY SAFE.

RICHARD PACIFIC”

4. On July 2, 2021, BCMS issued a conciliation order dismissing request (conciliation order) (CMS No. 000324720) to petitioner. The conciliation order determined that petitioner’s protest of the subject notice was untimely and stated:

“The Bureau of Conciliation and Mediation Services does not have jurisdiction over this matter. The notice(s) at issue was not part of a timely filed request. Therefore, the Bureau of Conciliation and Mediation Services is precluded from making a determination on the merits of this case.

The request filed for a Conciliation Conference is dismissed.”

5. Petitioner filed a timely petition with the Division of Tax Appeals in protest of the conciliation order on September 2, 2021. Mr. Pacific signed the petition and was listed as petitioner’s representative in section III of the petition. The petition was date stamped received by the Division of Tax Appeals on September 3, 2021. The Division of Tax Appeals Petition Intake Unit notified petitioner and Mr. Pacific via email that Mr. Pacific was not qualified to represent it before the Division of Tax Appeals without special permission and an officer of the corporation must sign the petition.<sup>2</sup> Subsequently, petitioner’s president, Joseph L. Emmi, signed the petition on October 6, 2021, and provided same to the Tax Appeals Tribunal on October 12, 2021. A copy of the petition signed by Mr. Emmi was faxed to Ms. McDonnell’s

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<sup>2</sup> The email also informed petitioner that it could elect the small claims option and Mr. Pacific could request special permission to represent it at the small claims hearing. The address to which special permission requests were to be made, i.e. Jean A. McDonnell, Esq., NYS Tax Appeals Tribunal, Agency Building One, 3rd floor, Albany, NY 12223, was provided in the email as well.

attention at the Tax Appeals Tribunal on October 12, 2021.<sup>3</sup> In its petition, petitioner asserted that “AN UPDATED STATEMENT OF PROPOSED AUDIT WAS NOT RECEIVED,” and that the “Audit was closed due to covid before all information could be presented.” Petitioner, in its petition, also made assertions related to the merits of the case. Attachments to the petition included documentation related to the merits of the case.

6. On October 15, 2021, the Division of Tax Appeals Petition Intake Unit sent a letter to petitioner’s president acknowledging receipt of the petition in this matter. The letter provided, in part, as follows:

“As this petition is deemed in proper form, it has been forwarded to the NYS Department of Taxation and Finance, Office of Counsel for preparation of an answer. The answer is due from the Office of Counsel on or before December 29, 2021.

As previously discussed, your representative, Mr. Pacific does not appear to qualify to represent at the Administrative Law Judge level. You may opt to have Mr. Pacific appear as a witness, he may act as a consultant or you may give permission for him to participate in any scheduled conference calls, if you are also present . . . .

We are unable to correspond further with Mr. Pacific.”

A copy of this letter was sent to David Gannon, the Division’s Deputy Counsel.

7. On December 8, 2021, the Division mailed the answer to Mr. Pacific by United States Postal Service (USPS) certified mail. On or around December 8, 2021, the Division filed its answer with the Division of Tax Appeals.

8. In support of its motion for summary determination in this matter and to show proof of proper mailing of the notice, the Division provided the following with its motion papers: (i) the affirmation, dated December 2, 2022, of Adam Roberts, Esq., the Division’s representative; (ii)

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<sup>3</sup> In the accompanying Data Concepts, Inc. fax cover sheet, the following appeared in the “Comments” section: “I am sending the original out in the mail to you today. Mr. Pacific will be acting as a consultant and will participate in all schedule [sic] conference calls. Thank you for all of your help.”

an affidavit, dated March 31, 2022, of Deena Picard, a Data Processing Fiscal Systems Auditor 3 and Acting Director of the Division's Management Analysis and Project Services Bureau (MAPS); (iii) a "Certified Record For Presort Mail – Assessments Receivable" (CMR) postmarked March 13, 2020; (iv) an affidavit, dated April 6, 2022, of Susan Ramundo, a manager in the Division's mail room; (v) copies of the notice mailed to petitioner and its then-representative with the associated mailing cover sheets; (vi) a copy of petitioner's request for conciliation conference, dated "11/11/2020" and the accompanying fax cover sheet bearing the same date; and (vii) a copy of petitioner's New York State and Local quarterly sales and use tax return (form quarterly ST-100) for the period September 1, 2019 through November 30, 2019 (ST-100 for the period September 1, 2019 through November 30, 2019), electronically filed on December 7, 2019.

9. Adam Roberts, an attorney in the Office of Counsel of the Division, avers in his affirmation that petitioner's ST-100 for the period September 1, 2019 through November 30, 2019 was filed on December 7, 2019, and that this was the last return filed before the Division issued the notice. Mr. Roberts affirms that the Clay, New York, address appearing on the last return filed, corresponds to the address appearing on the notice.

10. Mr. Roberts, in his affirmation, asserts that the "Notice was also mailed to petitioner's representative, Richard A. Pacific, at his address of record, 309 S. Franklin St., Syracuse, NY 13202." He asserts that "Petitioner's representative's last known address was 309 S. Franklin St., Syracuse, NY 13202." There is no evidence attached to the motion to verify this assertion regarding petitioner's then-representative's last known address.

11. The affidavit of Deena Picard sets forth the Division's general practice and procedure for processing statutory notices. Ms. Picard has been a Data Processing Fiscal

Systems Auditor 3 since February 2006 and Acting Director of MAPS since May 2017. MAPS is responsible for the receipt and storage of CMRs. As a result of her duties in those positions, Ms. Picard is familiar with the Division's Case and Resource Tracking System (CARTS) and the Division's past and present procedures as they relate to statutory notices. Her affidavit explains the procedures surrounding the issuance of notices. CARTS generates the CMR. The CMR is produced (printed) approximately 10 days in advance of the anticipated date of issuance of the notices set forth thereon and lists an initial date (run date) in its upper left corner. That date is expressed as the year, Julian day of the year, and military time of day, in this case "20200661700." Following the Division's general practice, this date was manually changed on the first and last pages of the CMR in the present case to "3/13/20." In addition, as described by Ms. Picard, generally all pages of the CMR are banded together when the documents are delivered into the possession of the USPS and remain so when returned to the Division. The pages of the CMR stay banded together unless otherwise ordered. The page numbers of the CMR run consecutively, starting with "PAGE: 1," and are noted in the upper right corner of each page.

12. Statutory notices that are generated from CARTS are predated with the anticipated date of mailing and are assigned a certified control number. The certified control number of each notice is listed on a separate one-page mailing cover sheet, which also bears a bar code, the mailing address and the Departmental return address on the front, and taxpayer assistance information on the back. The certified control number is also listed on the CMR under the heading entitled "Certified No." The CMR lists each notice in the order the notices are generated in the batch. The assessment numbers are listed under the heading "Reference No."

The names and addresses of the recipients are listed under “Name of Addressee, Street, and PO Address.”

13. The CMR in the present matter consists of 19 pages and lists 208 certified control numbers along with corresponding assessment numbers, names and addresses. Each page of the CMR includes 11 such entries, with the exception of page 19 which contains 10 entries. Ms. Picard notes that the copy of the CMR attached to her affidavit has been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. A USPS employee affixed a postmark, dated March 13, 2020, to each page of the CMR, wrote the number “208” on page 19 next to the preprinted heading “TOTAL PIECES RECEIVED AT POST OFFICE,” and illegibly signed the last page of the CMR.

14. Page 17 of the CMR indicates that a notice with certified control number 7104 1002 9730 0119 6173, and reference number L-051324966 was mailed to petitioner, “J.L.E. LANDSCAPING, INC.” at the Clay, New York, address listed on the notice. The corresponding mailing cover sheet, attached to the Picard affidavit as part of exhibit “B,” bears this certified control number and petitioner’s name and address as noted.

15. Page 17 of the CMR indicates that a notice with certified control number 7104 1002 9730 0119 6180, and reference number L-051324966 was mailed to petitioner’s then-representative, Richard A. Pacific, at “309 S. FRANKLIN STREET SYRACUSE NY 13202.” The corresponding mailing cover sheet, attached to the Picard affidavit as part of exhibit “B,” bears this certified control number and the following name and address”

“RICHARD A. PACIFIC  
DATA CONCEPTS, INC.  
309 S. FRANKLIN STREET  
SYRACUSE, NY 13202.”

16. The affidavit of Susan Ramundo, a manager in the Division's mail room, describes the mail room's general operations and procedures. Ms. Ramundo has been in this position since 2017 and has been employed there since 2012, and, as a result, is familiar with the practices of the mailroom with regard to statutory notices. The mailroom receives the notices and places them in an "Outgoing Certified Mail" area. Ms. Ramundo confirms that a mailing cover sheet precedes each notice. A staff member receives the notices and mailing cover sheets and operates a machine that puts each notice and mailing cover sheet into a windowed envelope. Staff members then weigh, seal and place postage on each envelope. The first and last pieces of mail are checked against the information on the CMR. A clerk then performs a random review of up to 30 pieces listed on the CMR, by checking those envelopes against the information listed on the CMR. A staff member then delivers the envelopes and the CMR to one of the various USPS branches located in the Albany, New York, area. A USPS employee affixes a postmark and also places his or her initials or signature on the CMR, indicating receipt by the post office. The mail room further requests that the USPS either circle the total number of pieces received or indicate the total number of pieces received by writing the number on the CMR. The CMR is picked up at the USPS the following day by a member of the mail room staff and is delivered to other Division personnel for storage and retention. The CMR retrieved from the USPS is the Division's record of receipt by the USPS for the pieces of certified mail listed thereon.

17. Each of the 19 pages of the CMR attached to the Picard affidavit as exhibit "A" contains a USPS postmark of March 13, 2020. On page 19, corresponding to "TOTAL PIECES AND AMOUNTS" is the preprinted number 208 and next to "TOTAL PIECES RECEIVED AT POST OFFICE" is the handwritten entry "208," indicating 208 pieces of mail were received by the USPS. There is an illegible signature on page 19.

18. According to both the Picard and Ramundo affidavits, a copy of the notice was properly mailed to petitioner on March 13, 2020, as claimed.

### ***CONCLUSIONS OF LAW***

A. A motion for summary determination “shall be granted if, upon all papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented” (20 NYCRR 3000.9 [b] [1]).

B. Section 3000.9 (c) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (Rules) provides that a motion for summary determination is subject to the same provisions as a motion for summary determination pursuant to CPLR 3212. “The proponent of a summary determination motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). As summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is “arguable” (*Glick & Dolleck, Inc. v Tri-Pac Export Corp.*, 22NY2d 439, 441 [1968]; *Museums at Stony Brook v Vil. of Patchogue Fire Dept.*, 146 AD2d 572, 573 [2d Dept 1989]). “If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts,” then a full trial is warranted and the case should not be decided on a motion (*Gerard v Inglese*, 11 AD2d 381, 382 [2d Dept 1960]). “To defeat a motion for summary judgment, the opponent must . . . produce ‘evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim’” (*Whelan v GTE Sylvania*, 182 AD2d 446, 449 [1st Dept 1992], citing *Zuckerman*).

C. Petitioner did not respond to the Division's motion. Therefore, petitioner is deemed to have conceded that no question of fact requiring a hearing exists (*see Kuehne & Nagel, Inc. v Baiden*, 36 NY2d 539, 544 [1975]; *John William Costello Assocs. v Std. Metals Corp.*, 99 AD2d 227, 229 [1st Dept 1984] *appeal dismissed* 62 NY2d 942 [1984]). However, in determining a motion for summary determination, the evidence must be viewed in a manner most favorable to the party opposing the motion (*Museums at Stony Brook v Vil. of Patchogue Fire Dept.*, at 574; *see also Weiss v Garfield*, 21 AD2d 156, 158 [3d Dept 1964]).

D. Tax Law § 1138 (a) (1) authorizes the Division to issue a notice of determination for additional tax or penalties due under articles 28 and 29 of the Tax Law. A taxpayer may protest a notice of determination by filing a petition for a hearing with the Division of Tax Appeals within 90 days from the date of mailing of such notice (*see* Tax Law § 1138 [a] [1]). Alternatively, a taxpayer may contest a notice by filing a request for a conciliation conference with BCMS "if the time to petition for such a hearing has not elapsed" (Tax Law § 170 [3-a] [a]). It is well established that the 90-day statutory time limit for filing either a petition or a request for a conciliation conference is strictly enforced and that, accordingly, protests filed even one day late are considered untimely (*see e.g. Matter of American Woodcraft*, Tax Appeals Tribunal, May 15, 2003; *Matter of Maro Luncheonette*, Tax Appeals Tribunal, February 1, 1996). This is because, absent a timely protest, a notice of determination becomes a fixed and final assessment and, consequently, the Division of Tax Appeals is without jurisdiction to consider the substantive merits of the protest (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

E. Where, as here, the timeliness of a request for conciliation conference is in question, the initial inquiry is whether the Division has carried its burden of demonstrating the fact and

date of the mailing to petitioner's last known address (Tax Law § 1147 [a] [1]; *see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). A statutory notice is issued when it is properly mailed, which occurs when it is delivered into the custody of the USPS (*Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1991). To meet its burden, the Division must show proof of a standard procedure used by the Division for the issuance of statutory notices by one with knowledge of the relevant procedures and must also show proof that the standard procedure was followed in this particular instance (*see Matter of Katz; Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

F. When a statutory notice is found to have been properly mailed by the Division, i.e. sent to the taxpayer (and its representative, if any) at its last known address by certified or registered mail, the petitioner in turn bears the burden of proving that a timely protest was filed (*Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990). However, as noted, the burden of demonstrating proper mailing in the first instance rests with the Division (*id.*; *see also Matter of Ruggerite, Inc. v State Tax Commn.*, 97 AD2d 634, 635 [3d Dept 1983], *affd* 64 NY2d 688 [1984]).

G. Here, the Division introduced proof sufficient to establish the mailing of the notice to petitioner's last known address on March 13, 2020. The CMR has been properly completed and therefore constitutes highly probative documentary evidence of both the date and fact of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001). The affidavits submitted by the Division adequately describe the Division's general mailing procedure as well as the relevant CMR and thereby establish that the general mailing procedure was followed in this case (*see Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). Further, the address on the mailing cover sheet and CMR conform with the address listed on petitioner's electronically filed ST-100

for the period September 1, 2019 through November 30, 2019, which was the last return filed by petitioner before the notice was mailed, and thus satisfies the “last known address” requirement. It is thus concluded that the Division properly mailed the notice to petitioner on March 13, 2020, and the statutory 90-day time limit to file either a request for conciliation conference with BCMS or a petition with the Division of Tax Appeals commenced on that date (Tax Law §§ 170 [3-a] [a]; 1138 [a] [1]).

H. Petitioner has offered no evidence to counter the Division’s evidence that the notice of determination was issued to it on March 13, 2020. Mere denial of receipt is insufficient to rebut the presumption that a properly mailed notice of determination was delivered or offered for delivery in the normal course of the mail (*Matter of New York City Billionaires Construction Corp.*, Tax Appeals Tribunal, October 20, 2011; *see Matter of T.J. Gulf v New York State Tax Commn.*, 124 AD2d 314, 315 [3d Dept 1986]).

I. While the Tax Law does not specifically provide for the service of a statutory notice on a taxpayer’s representative, the Tax Appeals Tribunal has consistently held that the 90-day period for filing a petition or request for a conciliation conference is tolled if the taxpayer’s representative is not served with the statutory notice (*see Matter of Oberlander*, Tax Appeals Tribunal, August 24, 2020; *Matter of Nicholson*, Tax Appeals Tribunal, June 12, 2003; *Matter of Kushner*, Tax Appeals Tribunal, October 19, 2000; *Matter of Brager*, May 23, 1996; *Matter of Multi Trucking*, Tax Appeals Tribunal, October 6, 1988, citing *Matter of Bianca v Frank*, 43 NY2d 168 [1977]). In this case, the Division failed to submit any evidence regarding petitioner’s then-representative’s last known address of record at the time the notice of determination was issued (*see Matter of Oberlander*). Additionally, there is no evidence of actual delivery or a specific date of receipt of the notice of determination by petitioner’s then-

representative. As such, the Division failed to prove that its standard procedure for mailing a copy of the notice of determination to petitioner's representative was followed in this case, and that the notice was served on the representative. Accordingly, the Division's motion is denied.

J. Another procedural matter must be addressed. Section 3000.4 (b) (1) of the Rules requires the Division's office of counsel to serve an answer on the petitioner, or petitioner's representative, within 75 days from the date the supervising administrative law judge acknowledged receipt of the petition in proper form. That section further requires that a copy of the answer with proof of service on the petitioner or petitioner's representative, if any, must be filed with the supervising administrative law judge of the Division of Tax Appeals (*see* 20 NYCRR 3000.4 [b] [1]).

K. In the instant matter, the Division mailed its answer to Mr. Pacific on December 8, 2021 (*see* finding of fact 7). However, the record clearly shows that petitioner did not have a representative at the time the Division of Tax Appeals acknowledged receipt of the petition in proper form and forwarded same to the Division for preparation of an answer (*see* findings of fact 5 and 6). Since the answer was mailed to petitioner's former representative and not to petitioner, the Division failed to properly serve its answer in this matter (*see* 20 NYCRR 3000.4 [b] [1]). The failure of the Division to properly serve its answer results in the admission of all material allegations of fact set forth in the petition (*see Matter of Forest City Enterprises, Inc.*, Tax Appeals Tribunal, May 19, 2016).

L. The Division of Taxation's motion for summary determination is denied and this matter will proceed to a hearing on the merits.

DATED: Albany, New York  
March 30, 2023

/s/ Winifred M. Maloney  
ADMINISTRATIVE LAW JUDGE